

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 08 of 2000

PUBLIC PROSECUTOR

-v-

RUBEN TUSI IARUEL

Coram Justice Roger Coventry

*Counsel Ms. Britt Lardell for the Public Prosecutor
Mr. Less Loughman for the Defendant*

JUDGMENT

The defendant now faces two charges of indecent assault c/s 98 (1) Penal Code, the first from April 2000 and the second from Wednesday 21 June. Section 98(1) refers to any act of indecency with a person under the age of 13 years.

The complainant was born on 20 September 1990. She was nine years old at the time of these incidents. She said that she walks to and from the SDA School. On each occasion on the way home the defendant, whom she knew by name, took her off the road into the bush, lay her down, removed her clothing and indecently assaulted her. After the second occasion she told her parents. They took her to the 'Jet' dispensary and then to the police and Lenakel hospital for examination. The nurse practitioner Alfred Manu examined her there. He found vaginal bleeding, tears of the cervix and vaginal wall and some bruising to the skin outside. He concluded there had been forceable interference with the complainant's genitals.

The defendant denied the matter. He gave an account of where he was in the afternoon of 21 June and said he didn't see the complainant. He knows her by sight, but not by name. He knows her parents and is related to them. He could not say what happened in April, a long time ago, but he never did what is

alleged. He called the nurse from the Jet dispensary who examined the complainant on 21 June. She only found a slight scratch outside the vagina. It was just oozing blood. She sent the girl to Lenakel hospital for a stitch as she didn't have the right kind of suture. She said the girl said the names of two boys, not the defendant. The defendant also called the girl's teacher, John Songa. He had heard rumours the day after the incident and went to speak to the girl separately from her parents. He says she told him that the injury was because she felt sore and scratched herself. He says that she told him her family had frightened her, and to tell the name of Iaruel. She said it wasn't Iaruel.

When news of the allegation was known several people sought the defendant and he left and went to the police station from the middle bush area. There is nothing adverse to the defendant in this.

The defendant was interviewed by police. On a voir dire I ruled what he said to the police as inadmissible, and I completely disregard that evidence.

The prosecution case therefore rests on the evidence of the complainant and the nurse practitioner, Manu. It is for the prosecution to prove its case beyond reasonable doubt. It is not for this defendant to prove anything.

The complainant is of "tender years", ten now and nine at the time of the incident. I look for corroboration of her evidence for this reason. This is also an allegation of a sexual offence. I remind myself it is dangerous to convict on the uncorroborated evidence of a complainant in such a case. Although in some jurisdictions these requirements have been abolished, they remain here and I must examine the evidence accordingly.

At the close of the prosecution case I dismissed allegations of rape and unlawful sexual intercourse. This was not specifically because of a lack of credibility in the prosecution witnesses, but because the evidence shewed only an entry of some object into the girl's vagina and not necessarily penetration by a penis.

Before the complainant gave evidence I examined her as to her understanding of telling the truth and the meaning of an oath. I found she did understand and she gave her evidence sworn.

The complainant said that on 21 June she was going home from school alone. "I saw Ruben Iaruel. He held me, he took me into the bush. I lay down... He sat down on me, he said not to tell anyone, my mummy or daddy or he will kill

me dead. He made something with me... He made sex with me... When Ruben made his action I wasn't wearing clothes. Blood run. [She pointed to lower abdomen]. I wiped blood off with leaf. After he made the action he ran away into the bush... I went to my home. I saw my daddy and mummy. I didn't talk to my mummy and daddy".

This was the first incident. She then described the second incident, in June. She said "I saw Ruben Iaruel, he held me, we went in bush. He carry me. He sat down on me. When he sat down on me I wasn't wearing anything. Ruben took off my clothes... He sat down and "move move"... No other man or woman there... He took of his clothes and took off my clothes... I "sleep"... then he made something... after incident I went home. Blood was drawn". Again she indicated her lower abdomen. When asked, "why did the blood run?" she replied "Ruben" "I wiped the blood on a leaf... Ruben said if I tell anyone he will kill me dead."

Two days later she was seen by the nurse practitioner who found the injuries set out above.

The complainant was cross-examined. She agreed she could walk to the Jet dispensary after the second incident. She could walk. She said the female nurse asked, "he bin stickem yu", she replied yes. She said she mentioned the names of two boys, she denied saying it was these two boys who have sat down on her.

It was put to her that she had talked to her teacher. At first she didn't reply, then said 'no'. It was put to her that her daddy had told her to say the name was 'Iaruel'. She replied 'No'. It was then put to her it was not Iaruel who did this. She replied 'it was Iaruel'

Throughout her evidence I observed the complainant very carefully, without letting her realise this. She answered non-contentious and non-embarrassing questions clearly and with ease and understanding. Although her mother sat next to her she did not turn to her for approbation or any indication of what to say. There was a natural lowering of the voice when talking about the incidents. She became distressed near the end of the examination in chief and she had a break. She became gradually tearful as cross-examination progressed, it was properly conducted, but nevertheless answered questions accepting some matters put and rejecting others. At times her voice was a whisper and the interpreter had to be asked to relay her answer. She accepted mentioning the names of two boys but said they were not the ones who "sat on her". When it

was finally put to her "it was not Iaruel" – her eyes widened in apparent incomprehension at what was being suggested and firmly said it was him. This was perhaps the most impressive part of her evidence. When asked, "It wasn't you who told the police what happened?" She gave the same reaction and replied "It was me. I told them and they wrote it"

I accept her evidence. I am satisfied she is telling the truth. Further, I could not find any part of her evidence which suggested that it was anything other than a ten year old girl recounting two distressing incidents. I am satisfied that her description of what happened is sufficient in law to amount an offence against section 98 (1) on each occasion. Although what was described was not fully as particularised in the counts, it was consistent and amounted to the offences.

I accept the evidence of Alfred Manu. He has clearly made many such examinations, his notes were contemporaneous and produced to the court.

I turn to the defendant's evidence. It is understandable that, if he were not involved, he would not remember the earlier incident. He gave an account of what he did on the afternoon of 21 June. He described where he went, what he did and whom he spoke to. There is no obligation on a defendant to call supporting evidence. I do note there is no evidence to support where the defendant was at any stage during that afternoon. He then described how he was assaulted and put in fear the next day and went to the police station.

In cross-examination he said he didn't know the complainant by name. He knew her parents but not her. He lived by the route the complainant took to and from school. He denied having sex with her.

The defendant was calm throughout his evidence; and it was delivered in a flat tone. I do not accept his evidence. I do not believe him when he says he did not know the complainant's name and further when he denied "having sex" meaning an indecent assault, with her.

I consider the evidence of Sarah Kalma. She was the nurse seen on the evening of 21 January at the Jet Dispensary. She says she only found a slight redness and a little oozing blood outside the vagina. She described the girl as stubborn, and wouldn't talk to her, even when she approached gently. She says at one stage her parents came in and "talked strong" to the girl. She said the names of two boys were mentioned but she couldn't remember what these were. This is accepted by the complainant. There is no evidence as to what was being said about the boys. She did not say the complainant was blaming or accusing them.

I am not satisfied she did the full and complete examination that Manu carried out. Whilst not purporting to use any medical expertise, when asked why refer a slight scratch, with a little oozing blood to the hospital for stitching, her reply was "if they try to do something". I find her manner, as far as the complainant was concerned on that evening of the incident, might well have been over-bearing, at a time when the complainant would have been very upset. I do not find her evidence undermines that of the complainant or Manu.

I turn to the evidence of John Songa. He is the teacher at the complainant's school and has known her since she has been there. He is related to both the defendant and the girl's parents. He said the defendant did know the girl's name. On 22 June he went to talk to the girl as he is her teacher and she was absent from school. He took her apart from her parents with their permission and asked "his questions". He enumerated them, "question 1," "question 2" and so on. He says that she told him she was sick but didn't say what. "Question 3 and Question 4 I said you know Iaruel Tusi you met him on road. She told me straight "I didn't meet him". He further questioned her about her injury and said that she said her private part was sore and she scratched it and her finger went in a little bit." He says she told him her family had told her to say it was Iaruel" he said he wanted to take her from parents because he'd heard rumours.

This was an insensitive piece of questioning by someone in authority of a distressed girl and a matter that should have been left to the police. The complainant was doubtless upset, especially in the emotionally charged atmosphere of the next day. She was taken apart from her parents and questioned. No record was apparently made of their conversation it wasn't reported to the police, and its accuracy is suspect, especially in view of the findings of Manu. I reject this evidence.

I have again considered the evidence of the complainant in the light of the defence evidence and particularly again concerning corroboration and the dangers of convicting on the uncorroborated evidence of a child and in a sexual case. I find the evidence of Manu does provide some corroboration of a forcible sexual interference with the complainant. That evidence clearly does not corroborate in any way the fact it was this defendant. However, the evidence of the complainant was clear and unprompted-it was the defendant. She has been consistent throughout. When she was challenged, quite properly, in cross-examination, she could not understand why such a suggestion was made.

I find the acts alleged by the complainant did occur on both occasions they were acts of indecency and the complainant was under 13 years at the time, namely nine years. I convict accordingly.

P.P. No pre – convictions

P.S. I have instructions to appeal
Court has found defendant guilty on two counts of indecent assault.
Court is aware of circumstances. I mustn't go inside this.
Defendant is 20 years old
Mangam village, in middle bush area.
Single.
Seven children. 4 girls and 3 boys
Defendant is oldest
Defendant's father is in Vila since March of this year
Defendant stays in Tanna with his mother and family
Being oldest, and father away, he assume responsibility of home.
He builds and maintains house of family and makes gardens, for food.
Subsistence farmer
When he came to police he had 3 gardens and clearing a No. 4 garden.
He doesn't know if family maintains garden
Defendant's chief, gave a bullock and 2 kava and 1 pig to complainant's relatives. Defendant was in custody.
He went to Grade IV
People aware of incident, life has greatly affected.

Ct I accept his life is difficult and people threatening him.

P.S. He has difficult future back at his village. He has to live with this for some time.
He is single
Future to find a partner will affect him too.
Been in custody since 24/6/00 to today.
Defendant has already had enough punishment
I therefore ask for non-custodial.
If custodial sentence is appropriate I asked for

Leniency.

Ct

I can't give credit for a guilty plea.

However you are a young man, and have no previous convictions. Complainant clearly upset.

I also accept life has been difficult for you since this incident and it will be for many years to come.

It will also affect your ability to find a wife and long term partner.


I accept that this incident came from sexual frustration and not having a partner. But I must also look to the girl. It was very frightening for her. It happened not just once, which might be spur of the moment, but on a second time. I have reduced the sentence a lot because of your age. But I must consider this complainant and also the safety of young girls.

Sentence on CT1 - 3 years prison
CT 3 - 3 years prison concurrent
from 24/6/00

Informed of right of appeal.

Dated at Port Vila, this 16th day of December 2000

BY THE COURT



R. J. COVENTRY
Judge